United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: April 12, 2004

TO : Michael McConnell, Regional Director
Region 17

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: T & W Pole Line Contracting, Inc. 506-4067-9500
Case 17-CA-22364 506-6090-0200
506-2050-0000

The Region submitted this case for advice as to whether an employee-organizer was engaged in protected activity when he discussed with the Employer's employees potential job opportunities with a signatory employer and the Union's apprenticeship program, and whether the Employer's responses to this activity, including the discharge of the employee-organizer, violated Sections 8(a)(1) and (3).

We conclude that a complaint should issue, absent settlement, alleging that the employee-organizer was engaged in protected activity and that the Employer's actions, including the discharge of the employee-organizer, violated Sections 8(a)(1) and (3).

FACTS

The employer, T & W Pole Line Contracting, Inc. (Employer), is a non-union contractor that constructs powerlines for electric utility companies and employs about thirty employees. The employee-organizer, Vincent Harms (Harms), is a member of Local 2 of the International Brotherhood of Electrical Workers (Union).

On July 7, 2003,[1] Union organizer Johnny Atchison contacted Harms about an advertisement for a lineman position and suggested he contact the Employer's owner Mike Schulte (Schulte) to try and get hired so he could organize the Employer's employees. Harms contacted Schulte and faxed him his resume which omitted any affiliation with the Union. After a brief telephone interview, Schulte hired Harms for the position. Harms was instructed by the Union that once he started working for the Employer, he should refrain from

[1] All dates occurred in 2003, unless otherwise noted.

engaging in organizing activity until after he had the opportunity to gauge the employees' interest in the Union.

Soon after he began working, Harms talked to fellow employees about the Union. He showed the employees pay stubs he earned from union contractor jobs. He discussed the Union's apprenticeship program and sent applications to some of the employees' homes. During a lunch break, Harms showed a videotape of union workers performing high-voltage construction from the side of a helicopter. Harms also discussed a large Department of Transportation job in St. Louis, which he asserted would be awarded to a signatory contractor.[2] At the time of these events, no subcontractor had been awarded the electrical work for the Metrolink Project.

The Region interviewed three employees during its investigation.[3] They all recall Harms discussing the Metrolink Project. One employee claims Harms said he was working for the Employer to recruit people for the Union because the Union was about to start work on the Metrolink Project. Two other employees recall Harms discussing the Metrolink Project in connection with the apprenticeship program. One of these employees recalls Harms discussing how he may have the opportunity to work on the Metrolink Project as part of his apprenticeship. However, he understood that he could remain with the Employer even if he became an apprentice if the Employer unionized. The other employee recalls Harms talking about possible "openings in St. Louis." He believed that acceptance into the program would require him to leave the Employer at some point in time.[4]

On July 28, an employee approached general foreman Raymond "Dub" Peavler (Peavler)[5] and told him Harms was a

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[2] The project Harms was referring to was related to Metrolink which involved the construction of a new line to the area's existing light-rail system and was the largest anticipated transportation project in the St. Louis area. This project shall hereinafter be referred to as the "Metrolink Project."

[3] Harms claims he spoke to all the employees about the Union except for the foreman's son, Ryan Peavler.

[4] Harms sent applications for the apprenticeship program to employees' homes. Two employees returned completed applications to Harms.

[5] As a general foreman, Peavler is a supervisor under Section 2(11).

union representative and was there to recruit employees to work on the Metrolink Project. Peavler was told that Harms had convinced two employees to go with him. Later that day, Peavler drove to the site where one of those employees was working and asked him in the presence of two other employees if Harms had talked to him about the Union. He answered, Yes. Peavler then asked him what Harms had said about the Union. He responded that Harms told him that if he wanted to make big bucks, he needed to join the Union's apprenticeship program. Peavler said nothing further and drove away. He then contacted Schulte and told him that Harms was there to recruit their employees to work for union contractors.

The next day, Peavler approached Harms and told him he knew that he had been talking to people about the Union. Harms asked Peavler if he was angry because he thought Harms was a talent scout. Peavler then asked, Why is the Union messing with us and what do they want with our people? to which Harms responded, I am here to do a good job but in my free time, I am going to talk to the employees about joining the Union. Peavler said he was shutting the job down for the day and radioed the other employees and told them to return to the show-up. After the employees gathered at the show-up, Peavler shook Harms' hand and said, It has been good knowing you. Harms asked if he was fired. Peavler said he would call him later to let him know.

After speaking with Harms, Peavler turned to the rest of the employees and asked an employee if he was going with the Union. He replied, No. Peavler then told the employees that he was shutting the job down until he could figure this Union thing out.[6] He told them they would be paid for five hours.[7] Peavler then announced he would be going to the local restaurant for breakfast and invited the employees to join him. Employee Chris Hansen (Hansen) left the show-up with Harms. The remaining employees went with Peavler to the local restaurant.[8] Peavler contacted Schulte on his way

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[6] There are conflicting statements with regard to whether Peavler said figure this Union thing out or figure this thing out. However, it is clear that all the employees knew Harms was a union organizer.

[7] The employees usually worked four, ten-hour days and regularly worked overtime.

[8] The Union states in a position statement that at the breakfast an employee heard Peavler tell the employees, "The Union will take your tools, burn your trucks and sabotage jobs" and further, "anyone who wants to join the Union can

to the restaurant. Schulte said that yesterday's conversation with Peavler prompted him to check into Harms' application which he discovered had been fabricated. After the breakfast, Peavler contacted Schulte again and suggested they discharge Harms for fabricating his resume. Schulte gave Peavler the authority to terminate Harms.

Meanwhile, Harms and Hansen returned to the motel where the employees were staying.[9] Hansen checked out of the motel because he believed the Employer would not pay for the employees to stay at the motel after sending everyone home early.

At about 5:30 p.m. that same day, Peavler called Harms and said, I hate to see you go, you're a damn good lineman but with you being with the Union and all, you might as well not show up tomorrow. Peavler did not tell Harms the reason for his discharge.

The following morning, Hansen contacted Peavler at 4:30 a.m. to ask if he still had a job.[10] Peavler asked Hansen what was going on and Hansen responded that he was probably going with the Union deal. Peavler responded that there was no need for him to show up for work.[11]

ACTION

We conclude that, absent settlement, complaint should issue alleging that Harms was engaged in protected activity and, therefore, the Employer's termination of Harms violated Sections 8(a)(1) and (3).[12]

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leave and anyone who talks to Harms will be fired." [*FOIA Exemption 5*
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[9] The employees who lived too far to commute to the jobsite stayed at the motel at the Employer's expense.

[10] At the time of these events, Hansen lived in Clinton, Missouri which is about an hour and a half commute from the show-up.

[11] On September 23, Schulte made a verbal offer of reinstatement to Hansen. Hansen accepted the offer and his reinstatement became effective on October 29.

[12] We agree with the Region's determination that the Employer unlawfully discriminated and discharged Hansen in violation of Sections 8(a)(1) and (3) for leaving the show-up with Harms, a known union organizer, instead of going with Peavler and the others to breakfast and for stating

We conclude that Harms was engaged in protected activities. In M.J. Mechanical, 324 NLRB 812 (1997), the Board found that the two employee-organizers were unlawfully discharged in retaliation for engaging in "salting activities" which included, "talking to [employer's] nonunion employees, comparing [u]nion benefits to those offered by the [employer], offering to answer employees' questions, describing the [u]nion's apprenticeship program, and in general discussing the pros and cons of belonging to the [u]nion."[13] According to the facts of the instant case, Harms was engaged in the same activities the Board found to be protected in M.J. Mechanical.

Harms' discussion with employees about the Union's apprenticeship program was part of his overall discussion of the Union's benefits. He discussed the program as an opportunity for employees to receive electrical and safety training and to earn better wages. He distributed applications after learning that many of the employees were not qualified to work on electrical powerlines. His distribution of the applications was not an attempt to solicit the employees to quit; an employee could become an apprentice and continue working for the Employer if the Employer unionized. Similarly, the employee-organizers in M.J. Mechanical discussed the union's apprenticeship program with the employees and further, "encouraged them to contact the [u]nion and discuss job opportunities with union contractors."[14] An employee involved in the discussion soon after left and became a union apprentice.[15] The Board rejected the employer's contention that the union-organizers

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that he would probably join the Union at some point in the future. The facts indicate that Hansen did not quit as the Employer contends; if he had quit he would not have called Peavler on the morning he was discharged to ask if he still had a job. Furthermore, we conclude that, absent settlement, complaint should issue on all of the alleged Section 8(a)(1) violations because the Employer unlawfully interrogated and threatened employees about their participation in protected, concerted activity.

[13] 324 NLRB at 812, 813 (1997). See also Arlington Electric, Inc., 332 NLRB 845 (2000)(employee's distribution of union flyer advertising union-scale employment elsewhere in attempt to motivate employees to demand higher wages from employer was protected).

[14] 324 NLRB at 812, 826 (1997).

[15] Ibid.

were soliciting employees to leave in order to drive it out of business, stating:

> The record shows, however, nothing more than employees discussing the benefits of unionizing, which, in the industry involved in this case, include apprenticeship programs. That an employee decided to take advantage of such a program can hardly be called 'luring' employees away from the [employer] and in no way translates into attempting to put the [employer] out of business. 324 NLRB at 812, 813 (1997).

As part of his organizing efforts, Harms discussed how joining the Union could broaden the employees' employment opportunities. He showed the employees a videotape of union workers performing high-voltage maintenance and discussed the wages they earned and the training required for such specialized work. Harms also discussed potential job openings in connection with the Metrolink Project. However, unlike in Abell Engineering & Manufacturing, Inc., 338 NLRB No. 42 (2002), he did not refer any employee to a specific job elsewhere.[16]

In Abell, the Board found that the employee-organizer's attempt to solicit an employee to quit the employer to work for a signatory employer was not protected activity and therefore, the employer did not violate the Act by firing the employee-organizer.[17] The employee-organizer in Abell attempted to organize a three-man welder/fabricator unit.[18] After he was unable to persuade the two employees to sign cards, the union instructed him to abandon his organizing campaign and to persuade one of the employees to take a position with a signatory employer.[19] The employee-organizer was fired after the employer learned of his

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[16] See also Technicolor Government Services, Inc., 276 NLRB 383, 388 (1985) ("Informing fellow employees of possible job opportunities with other employers does not divest such activities of their protected status, as long as those conversations are engaged in for the purpose of broadening the employees' employment opportunities and not for the purpose of inducing employees to sever their employment relationship with their employer.")

[17] 338 NLRB No. 42, slip op. at 2 (2002).

[18] Id. at 1.

[19] Ibid.

attempt to solicit its employee to leave its employ.[20] In reaching its decision, the Board found that the employee-organizer's attempts to induce the employee to quit for another job was "unrelated to organizing the [employer's] employees or to improving their conditions of employment with the [employer]" and that his actions would "have been deeply injurious to the company who would have been left with only one employee."[21] The Board was careful to limit its holding to the specific facts of the case and abstained from deciding "what, if any, protection a union organizer would have to induce an employee to quit for other employment in some other factual context."[22] We believe the narrow principal enunciated in Abell should not be applied here because the facts support that Harms did not attempt to induce employees to quit[23] but, rather, was engaged in protected activity when he discussed the Union's benefits, including potential job opportunities with a signatory employer and the apprenticeship program.

Further, Harms was engaged in protected organizing activity even though he did not distribute authorization cards. Atchison, the Union organizer, instructed Harms to refrain from soliciting cards until after he gauged the employees' interest in joining the Union. Harms had only worked for the Employer for three weeks before he was discharged. The Board in Abell held that the employee-organizer was no longer engaged in organizing activity when he admittedly abandoned his attempt to get cards signed and instead tried to persuade an employee to take a specific union contractor job.[24] In contrast, the facts here do not indicate Harms abandoned his attempt to organize and was instead focusing on recruiting employees for a specific job. Rather, as the Board found in M.J. Mechanical, the employee-organizers were still engaged in organizing activity

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[20] Ibid.

[21] Ibid.

[22] Id. at 1, n.2.

[23] The employer-organizer in Abell told the employee about a "job paying $15 an hour with Nu-Jac, a union contractor, on the west side of town, which was closer to where [the employee] lived." Even after the employee stated he was not interested, the employee-organizer persisted and told him it was a good job and that he should call the union if he had any questions. Id. at 4.

[24] See id. at 1.

notwithstanding the fact that they did not distribute cards, because their discussions with employees about the union's benefits constituted "traditional, organizing activity and [were] clearly protected by the Act."[25]

The Employer had knowledge of Harms' union activity prior to terminating him. When Peavler confronted Harms about the allegation that Harms was "recruiting" the Employer's employees for union jobs, Harms responded, I am here to do a good job but in my free time, I am going to talk to the employees about joining the Union. Harms thus made it clear that he was trying to organize the employees, not to solicit them to leave the Employer. The Employer's knowledge of Harms' protected activities is further demonstrated by its statements to employees about the consequences of engaging in such activities.

The Employer terminated Harms because of his protected union activity. The Employer's union animus is established by Peavler's interrogations of employees Chris Treece (Treece), Hansen and Harms and when he sent the employees home early, resulting in loss of pay. Peavler interrogated Hansen and Treece about whether Harms had talked to them about "the Union" and did not confine his questioning to Harms' alleged stripping activity. Peavler also told Harms, I know you have been talking to the employees about the Union. Finally, Peavler's explanation for shutting the job down early was so that the Employer could figure this Union thing out. From these statements, it is evident that the Employer disapproved of all union activity and that any employee who aligned himself with the Union would face consequences.[26]

That the Employer discharged Harms because of his protected activity is further demonstrated by its statement of a clearly pretextual reason for the discharge. The Employer claims it fired Harms for fabricating his resume, however, the Employer only checked the veracity of Harms' resume after it learned that he was a union organizer. The Employer admits it had never fired someone for fabricating his resume nor was it the Employer's practice to retroactively review a resume after the person had been hired and had started working. Moreover, when Peavler

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[25] 324 NLRB at 812, 814 (1997) quoting Tualatin Electric, 312 NLRB 131, 135 (1993).

[26] [*FOIA Exemption 5*

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contacted Harms to fire him, he did not say that Harms was being discharged for fabricating his resume or for attempting to steal its employees. Rather, he said, I hate to see you go. You're a damn good lineman but with you being with the Union and all you might as well not show up tomorrow.[27]

Accordingly, a Section 8(a)(1) and (3) complaint should issue, absent settlement.

B.J.K.

[27] The Employer's arguable mistaken belief that Harms was inducing its employees to quit and work for other employers is not a defense to an unlawful discharge violation under Section 8(a)(1) or (3) because Harms was, in fact, engaged in protected Section 7 activity. See generally NLRB v. Burnup and Sims, Inc., 379 U.S. 21, 23 (1964)(employer unlawfully discharged employees based on honest but mistaken belief that the employees had engaged in misconduct when they were in fact engaged in protected Section 7 activity).